Ting Su Lee v Lie Nyuk Kie

HIGH COURT (KUCHING) — SUIT NO 22–104 OF 2010–II/I
SANGAU GUNTING J
8 JUNE 2012

Civil Procedure — Injunction — Interim injunction — Probate action — Application to restrain administrator from acting under letters of administration ('LA') until final determination of action — Test for grant injunction against administrator — Whether actual misconduct or fraud and immediate danger of loss shown — Whether real risk that administrator would act upon the LA shown — Rules of the High Court 1980 O 29 & O 92 r 4

Succession — Probate and administration — Probate action — Interim injunction — Application to restrain administrator from acting under letters of administration ('LA') until final determination of action — Test for grant injunction against administrator — Whether actual misconduct or fraud and immediate danger of loss shown — Whether real risk that administrator would act upon the LA shown

Pursuant to O 29 and 92 r 4 of the Rules of the High Court 1980 ('RHC'), the applicant/defendant applied for, inter alia, interim orders that an injunction be granted restraining the respondent/plaintiff from: (a) acting and/or exercising any rights conferred upon him in respect of certain letters of administration ('LA') until the final determination of this action; and (b) dealing with any of the assets of the late Ting Kah Hock until the final determination of this action. The defendant claimed that there was a real risk that the plaintiff would act upon the said LA before the court could deliberate on the defendant's counterclaim in this action.

Held, dismissing the application with costs to be taxed unless agreed:

(1) The test whether or not to grant an injunction against an administrator or administratrix of an estate is that enunciated in *Sivanendran s/o V Markandoo & Anor v Dr Mahendran a/l V Markandoo* [1988] 2 MLJ 169 (SC). A strong prima facie case is required to induce a court to grant an interlocutory injunction against an administrator or administratrix of an estate and thereby displacing his/her authority. There must be some evidence of actual misconduct or fraud or immediate danger of loss, for the court is reluctant to interfere with the work of an administrator or administratrix except in special circumstances (see para 3).

(2) 'Evidence of actual misconduct or fraud and immediate danger of loss...' referred to in *Sivanendran*'s case contemplates of actual misconduct or fraud relating to the administration of the deceased's estate. In the instant case, there appeared to be no evidence of the plaintiff having actually made use of any of the rights purportedly conferred upon him by the LA issued to him. In fact, the defendant contemplated only of 'grave and imminent danger' that the plaintiff would make use of the said rights (see para 12).

(3) The absence of any challenge concerning the validity of the LA gave rise to a serious hurdle to the defendant's application: if the court were to accede to the defendant's prayers, the inevitable implication would be, that the court would, in effect, be doubting the correctness of the probate officer's exercise of his discretion. But how could the court entertain that doubt when the defendant did not challenge the validity of the LA, and had actually reiterated that setting aside the LA was not an issue before this court (see para 16).

[Bahasa Malaysia summary

Berikutan A 29 and 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), pemohon/defendan memohon untuk, antara lain, perintah-perintah sementara bahawa injunksi diberikan untuk menghalang responden/plaintif daripada: (a) bertindak dan/menjalankan apa-apa hak yang diberikan kepadanya berkaitan surat pentabiran tertentu ('SP') sehingga penentuan muktamad tindakan ini; dan (b) berurusan dengan apa-apa aset mendiang Ting Kah Hock sehingga penentuan muktamad tindakan ini. Defendan mendakwa bahawa terdapat risiko sebenar bahawa plaintif akan bertindak ke atas SP tersebut sebelum mahkamah dapat mempertimbangkan tuntutan balas defendan di dalam tindakan ini.

Diputuskan, menolak permohonan dengan kos untuk ditetapkan melainkan dipersetujui:

(1) Ujian sama ada atau tidak untuk memberikan injunksi terhadap pentadbir estet adalah ditetapkan di dalam kes *Sivanendran s/o V Markandoo & Anor v Dr Mahendran a/l V Markandoo* [1988] 2 MLJ 169 (MA). Satu kes prima facie yang kukuh diperlukan untuk menyakinkan mahkamah memberikan injunksi interlokutori terhadap pentadbir estet dan dengan itu menggantikan kuasanya. Mesti terdapat beberapa keterangan mengenai salah laku sebenar atau fraud atau bahaya kerugian serta merta, kerana mahkamah keberatan untuk campur tangan dengan kerja pentadbir kecuali dalam keadaan khas (lihat perenggan 3).

(2) 'Evidence of actual misconduct or fraud and immediate danger of loss...' yang dirujuk di dalam kes *Sivanendran* mempertimbangkan mengenai salah laku sebenar atau berkaitan pentadbiran estet si mati. Dalam kes

ini, tidak terdapat keterangan mengenai plaintif pada hakikatnya menggunakan apa-apa hak yang dianggap diberikan kepadanya oleh SP yang dikeluarkan kepadanya. Sebenarnya, defendan hanya mempertimbangkan terhadap 'grave and imminent danger' bahawa plaintif akan menggunakan hak-hak tersebut (lihat perenggan 12).

(3) Ketiadaan apa-apa cabaran berkaitan keesahan SP membangkitkan halangan serius terhadap permohonan defendan: jika mahkamah menyetujui kepada permohonan defendan, implikasi yang tidak dapat dielakkan adalah bahawa mahkamah akan pada hakikatnya, mencurigai ketepatan pelaksanaan budi bicara pegawai probet. Tetapi bagaimana mahkamah dapat mempertimbangkan kesangsian tersebut apabila defendan tidak mencabar keesahan SP, dan sebenarnya mengulang bahawa pengetepian SP bukan isu di hadapan mahkamah ini (lihat perenggan 16).]

Notes

For cases on interim injuction, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3642–3730.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)
Chew Sie Khim (f), Re [1964] MLJ 412 (refd)
Foo Sam Tek v Probate Officer, Simanggang [1960] SCR 17, SC (distd)
Sivanendran s/o V Markandoo & Anor v Dr Mahendran a/l V Markandoo [1988] 2 MLJ 169, SC (folld)

Legislation referred to

Rules of the High Court 1980 O 29, 92 r 4

Alvin Yong (Chong Brothers Advocates) for the plaintiff/respondent.
Josephine Ling (Loke, King, Goh & Partners) for the applicant/defendant.

Sangau Gunting J:

RULING

[1] Pursuant to O 29 and 92 r 4 of the Rules of the High Court 1980 ('RHC'), the applicant/defendant is applying for, inter alia, interim orders '(a) That an injuction be granted restraining the Plaintiff and/or his agents from using, acting and/or exercising any rights purportedly conferred upon him in respect of the Letters of Administration dated 20th March 2012 (Probate Matter No.206/2009 Vol.145 (c)) … until the final determination of this action (presumably Suit No.22-104-10-11) and until further Order …', and '(b) That an injunction be granted restraining the Plaintiff from dealing with

any of the assets of the late Ting Kah Hock as appearing in ANNEXURE II attached to the Letter of Administration dated 20th March 2012... or anywhere else until the final determination of this action and until further Order is given …'

[2] The defendant states the ground of her application (encl 113) briefly thus: 'there is a real risk that the plaintiff hereinabove named will act upon the said letters of administration dated 20 March 2012 (Probate Matter No 206 of 2009 Vol 145(c)) before this honourable court is able to deliberate on the defendant's counterclaim in this action.' The defendant says further grounds are set out in her affidavit in support affirmed on 4 May 2012 ('AIS'). In response, the plaintiff filed his affidavit in opposition affirmed on 15 May 2012 ('AIO'). The parties agreed that the defendant's ex parte summons in chambers (encl 113) be converted into an interparte application 'upon the Plaintiff's undertaking that he shall not exercise any rights purportedly conferred upon him in respect of (the aforesaid letter of administration)'.

[3] Concerning the test whether or not to grant an injunction against an administrator or administratrix of an estate, the applicant's/defendant's counsel concedes as to the appropriateness of the test enunciated in *Sivanendran s/o V Markandoo & Anor v Dr Mahendran a/l V Markandoo* [1988] 2 MLJ 169 (SC) cited by the respondent's/plaintiff's counsel. The judgement of Seah SCJ in that case contemplates of a higher standard of test vis a vis the test propounded by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In *Sivanendran s/o V Markandoo & Anor* it was held, inter alia:

> (2) a strong prima facie case is required to induce a court to grant an interlocutory injunction against an administrator or administratrix of an estate and thereby displacing his/her authority. There must be some evidence of actual misconduct or fraud or immediate danger of loss, for the court is reluctant to interfere with the work of an administrator or administratrix except in special circumstances.

[4] In substance, in both *Sivanendran s/o V Markandoo & Anor* and the instant action, the application for an interlocutory injunction is directed against the administrator, who, in the instant case, purely by virtue of the letters of administration obtained by him, is the respondent/ plaintiff. Therefore, prima facie, there appears to be merit in the applicant's/plaintiff's counsel's contention, that the higher standard of test as propounded in *Sivanendran s/o V Markandoo & Anor* is applicable to the instant case.

[5] Now, but for the plaintiff's/respondent's having already obtained the said letters of administration, considered in the context of the issue in the ongoing action between the plaintiff/respondent and the defendant/applicant, the issue

of the entitlement or otherwise of the plaintiff/respondent to the said letters of administration would have been substantially, if not wholly, dependent upon the success or otherwise of the plaintiff's/respondent's ongoing action (Suit No 22–104 of 2010–II) against the defendant/applicant or at any rate upon the outcome of the ongoing trial between the plaintiff and the defendant.

[6] It also seems undisputed that prior to the commencement of the ongoing action, each of the plaintiff/respondent and the defendant/applicant tried to obtain respectively the letters of administration and the grant of the letter of probate sometime in July 2009. Neither party succeeded. The then Sibu District Officer Wong See Meng stated in his reply to the defendant's then lawyers; '… pihak kami belum dan tidak akan mengeluarkan Surat Kuasa (LA) di atas nama Mendiang Ting Kah Hock kepada mana-mana pewaris yang menuntut. Hal ini berikutan, pihak kami *perlu menunggu keputusan dari pihak Mahkamah terlebih dahulu'*. (Emphasis added.)

[7] In the circumstances, the aforesaid conduct of the plaintiff's/respondent's subsequently on 20 March 2012 procuring the said letters of administration, albeit issued by a different probate officer, notwithstanding the still ongoing adjudication of the instant action between himself and the defendant, prima facie, would appear to be highly improper. The conduct in this case refers to the plaintiff's/respondent's conduct of, as aforesaid, going ahead with procuring the said letters of administration notwithstanding the still ongoing trial concerning his action against the defendant. It must be noted, however, that such conduct does not appear to constitute a conduct involved in the actual ordinary administration of the estate concerned.

[8] In any case the matter seems to be not as straight forward as pointing a finger at the respondent/plaintiff, and thereafter make conclusions and/or inferences, concerning the existence or otherwise of actual misconduct or fraud on his part without having regards to the issue: how did the impugned letters of administration come into existence in the first place? Or more specifically, despite of the plaintiff's unsuccessful previous attempt in July 2009, how did he manage to succeed in getting the letters of administration issued to him this time around?

[9] It would be noted that a consideration of the aforesaid issue as regards the procurement of the letters of administration, in any case, in fairness, would necessitate sufficient appreciation of, inter alia, the factors taken into account or not taken into account by the probate officer concerned. However, as pointed out by learned counsel for the plaintiff/respondent, there appears to be no challenge against the validity or otherwise of the said letter of administration. This appears to have given rise to this situation: on the one hand, the defendant is applying for, inter alia, an order 'that an injunction be

granted to restrain the plaintiff and/or his agents from using, acting and/or exercising any rights purportedly conferred upon him in respect of the Letters of Administration dated 20th March 2012 (Probate Matter No.206/2009 Vol.145 (c) until the final determination of this action and until further Order is given by this Honourable Court'; on the other hand, the absence of any challenge against the validity of the letters of administration necessitate an assumption that it is valid, notwithstanding the ongoing proceeding between the plaintiff and the defendant. The ongoing action between the plaintiff and the defendant, it is to be recalled, focuses primarily on the validity or otherwise of the purported last will of the late Ting Kah Hock.

[10] In the defendant's/applicant's counsel's further submission in reply dated 6 June 2012, learned counsel for the defendant submits that 'setting aside the Letters of Administration is not the issue before the Court … as the defendant is not applying to set aside the Letters of Administration … Therefore, there is no need to add the Probate Officer who had issued the Letters of Administration'.

[11] Learned counsel further submits: 'The defendant is making this application to stay the exercise of power purportedly conferred to the plaintiff under the Letters of Administration due to the fact that the plaintiff had instituted this action and effectively stayed the defendant's rights to administer the estate of the late Ting Kah Hock based on his last will. *The plaintiff cannot now be allowed to utilize the Letters of Administration when he had in fact submitted to the Court to determine the validity of the last will of the late Ting Kah Hock and to stay the defendant from exercising her rights to a grant of Probate*. Unless the plaintiff is prevented from exercising his purported rights under the Letters of Administration, the defendants (sic) rights as the appointed Executrix and Beneficiary under the said last will would be jeopardized and pre determined (sic) to her detriment'. This seems to be a reiteration of what appears to be the substance of the defendant's application as per encl 113. (Emphasis added.)

[12] Having regards to the rather peculiar circumstances of this case, as well as, the parties' various arguments in respect thereto, and keeping in mind the higher standard of test adopted in *Sivanendran s/o V Markandoo & Anor*, that 'There must be some evidence of actual misconduct or fraud and immediate danger of loss …', the relevant matters to consider would appear to be the following:

(a) in both *Sivanendran s/o V Markandoo & Anor* and the instant application (encl 113), the summons applying for an interlocutory order is directed against the administrator;

(b) 'evidence of actual misconduct or fraud and immediate danger of loss …'

referred to in *Sivanendran s/o Markandoo & Anor*, seem to contemplate of actual misconduct or fraud relating to the administration of the deceased's estate in that case;

(c) in the instant case, there appears to be no evidence of the plaintiff/respondent of having actually made use of any of the rights purportedly conferred upon him by the letters of administration issued to him; in fact, the defendant contemplates only of 'grave and imminent danger' that the plaintiff would make use of the said rights;

(d) in the circumstances, considered in the context of the higher standard of test aforesaid, coupled with the fact that there does appear to be no challenge against the issuance of the letters of administration, could it justifiably be concluded that based on the facts and circumstances of this case as could be gleaned from the parties' affidavit averments, there is on the part of the plaintiff being the administrator (purely by virtue of having merely obtained the letters of administration), 'evidence of actual misconduct or fraud and immediate danger of loss …'; and

(e) as seems impliedly contended by the plaintiff's/respondent's counsel in his submissions, as regards making use of rights purportedly conferred upon him by the letters of administration, for all practical purposes, the plaintiff has done nothing.

[13] Reverting to the defendant's counsel's contention: 'The plaintiff cannot now be allowed to utilise the letters of administration when he had in fact submitted to the court to determine the validity of the last will of the late Ting Kah Hock and to stay the defendant from exercising her rights to a grant of probate. Unless the plaintiff is prevented from exercising his purported rights under the letters of administration, the defendants (sic) rights as the appointed executrix and beneficiary under the said last will would be jeopardised and pre determined (sic) to her detriment,' the question arises: using these contentions, as well as, the other arguments of both parties to resolve the factual and legal issues in this application, could it be concluded that the higher standard of test in *Sivanendran s/o V Markandoo & Anor* has been sufficiently fulfilled?

[14] Perhaps, it is useful at this juncture to ask, what 'actual misconduct or fraud and immediate danger of loss' is being contemplated by the aforesaid submission of the defendant's counsel? It seems difficult to ascertain. In any case, as earlier considered, any misconduct of the plaintiff at this stage, if any, could not really be regarded as misconduct in his exercising the rights conferred by the letter of administration, for the simple reason he has not actually started making use of such rights presumably in the administration of the estate of the late Ting Kah Hock.

[15] In saying that setting aside the letters of administration is not an issue

before the court, the defendant is actually implying that in this application, she is not concerned as to the validity or otherwise of the letters of administration. Her concern focuses on not allowing the plaintiff to utilise the letters of administration to her detriment. It would appear, therefore, that, as having been earlier on indicated as well, in adjudicating this application, for all practical purposes, the letters of administration ought to be treated as valid.

[16] The absence of any challenge concerning the validity of the letters of administration, however, appears to have given rise to a serious hurdle to the defendant's application: if the court were to accede to the defendant's prayers, the inevitable implication would be, that the court would, in effect, be doubting the correctness of the probate officer's exercise of his discretion. But how could the court entertain that doubt when the defendant herself is not challenging the validity of the letters of administration, and has actually reiterated that setting aside the letters of administration is not an issue before this court.

[17] Anyway, doubting the correctness of the probate officer's exercise of his discretion, in the circumstances, would not be permissible as that would tantamount to treating the matter 'as if it were an appeal from the probate officer's decision' (see *Foo Sam Tek v Probate Officer, Simanggang* [1960] SCR 17 and *Re Chew Sie Khim (f)* [1964] MLJ 412). Similarly, to consider whether in issuing the letters of administration the probate officer had acted in excess of his jurisdiction as appears to have been urged by the defendant's counsel (due to the granting the letters of administration although the last will is still being determined by the court), would also tantamount to wrongly treating the matter as if it were an appeal from the probate officer's decision, thereby in effect circumventing what ought to be the appropriate procedure. Anyway, proceeding to consider issues such as the excess of jurisdiction issue aforesaid, also appear to be encroaching into the discretion of the probate officer.

[18] It is to be recalled that in *Foo Sam Tek alias Fu Tek* the issue of whether there was an error of law or excess of jurisdiction on the part of the probate officer surfaced in a proceeding by way of certiorari and mandamus to remove to the High Court the proceedings of the probate officer, so that the appeal could be considered on its merits, but the High Court refused leave to apply for an order of mandamus. In the instant case, the application is directed against the plaintiff/respondent, rather than the probate officer. The probate officer and the record of what transpired in the proceeding through which the plaintiff/respondent succeeded in obtaining the letters of administration are not before this court. To make any conclusion in the instant application as to the propriety or otherwise of the issuance of the letters of administration by the probate officer to the plaintiff would quite clearly also offend the principle of natural justice.

[19] The aforesaid hurdle appears to be one of those situations caused by 'a peculiarity of our law' as enunciated by Ainley CJ in *Foo Sam Tek v Probate Officer, Simanggang* [1960] SCR 17. More specifically he said on p 18: 'It is a peculiarity of our law that the grant of probate and administration is not in the hands of the court, but has been placed in the hands of officers from whose decision no channel of appeal is apparently available.

[20] It was based on all the reasons adumbrated above, that the defendant's application as per encl 113 was dismissed with costs to be taxed unless agreed.

Application dismissed with costs to be taxed unless agreed.

Reported by Kanesh Sundrum